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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/780,073	02/09/2001	William P. Apps	RPC 0557 PUS	7630

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EXAMINER

CASTELLANO, STEPHEN J

ART UNIT

PAPER NUMBER

3727

DATE MAILED: 04/02/2003

18

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/780,073

Applicant(s)

APPS, WILLIAM P.

Examiner

Stephen J. Castellano

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-28 is/are pending in the application.
- 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-28 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on ____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. ____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) ____.
- 4) ☐ Interview Summary (PTO-413) Paper No(s). ____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: .

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The finality of the previous office action has been withdrawn.

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

I.

Claims 13-18 and 21-28 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 13 recites the limitation "the upper edge" of the band side detail in the second to last line. There is insufficient antecedent basis for this limitation in the claim because it can't be determined if "the upper edge" refers to the "uppermost edge" previously recited in the claim. The claim is ambiguous since the upper edge could refer to any upper edge and upper edge which is not an uppermost edge or an uppermost edge.

Claim 22 recites the limitation "the parallel portions" in lines 9 and 10. There is insufficient antecedent basis for this limitation in the claim.

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless --

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

II.

Claims 6, 8, 9 and 12 are rejected under 35 U.S.C. 102(b) as being anticipated by Carroll ('213)(Carroll).

Carroll discloses a low depth nestable tray which is inherently capable of holding containers, the tray comprises a floor structure with container support areas and a low depth wall structure comprising columns (portions of the outer zig-zag bands which attach the inner zig-zag

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band to the floor structure) and a band (the annular inner zig-zag band), the band has side and end portions spaced above the floor structure and connected to the floor structure by the columns, the band is contoured downwardly to form a band corner portion that directly connects to the floor structure at each corner of the tray. A rib is formed on the exterior surface of each band corner portion by another portion of the outer zig-zag band near the ends of the zig-zag bands which connects with the band corner portion and a platform is formed on the top edge of each band corner portion. The bands are contoured downwardly at an angle appearing to be 45 degrees which is approximately 50 degrees. The band is contoured downwardly along the side of the tray to form a band side detail connected to the floor structure.

II Claims 6-18 and 21-26 are rejected under 35 U.S.C. 102(b) as being anticipated by Apps ('925) (Apps).

Apps discloses a low depth nestable tray for containers, said tray having a low depth wall structure comprising a plurality of columns (18) and a band (rail 16 and corner posts 20) having side and end portions spaced above the floor, the corner portion is formed by (posts 20) and wherein the band is contoured downwardly to form a band corner portion that directly connects to the floor structure at each corner of said tray. One vertical edge of the corner post 20 is an end portion of the band the other vertical edge of the corner post is a side portion of the band. A rib (21) is located on the exterior surface of each corner post and a platform is formed at the top edge of each corner post. Individual support columns (18) on the side of the tray can be considered to be part of the band that is contoured downwardly along the side of the tray to form a band side detail that connects to the floor structure at the side of the tray. Each column has an inner column surface which projects inward, and an outer column surface which is recessed

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inward to receive therein the inner column surface of an adjacent below-nested tray. Figures 5 and 6 disclose the band side details and band end details which extend below the uppermost portions of the band.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

IV

Claims 1-10, 12-15, 17-19 and 21-28 are rejected under 35 U.S.C. 103(a) as being unpatentable over Carroll.

Carroll discloses the invention except for an uppermost edge of the corresponding band corner portion is not an uppermost surface of the wall structure at the corresponding band corner portion as stated in claims 1 and 22, the top edge of the band central portion is not the uppermost surface of the wall structure at the band central portion as stated in claim 7 and the uppermost edge of the band side detail is not the uppermost surface of the wall structure at the band side detail as stated in claim 13. See MPEP 2144.04 Part II, elimination of an element. It would have been obvious to remove an element with retention of the elements function.

Therefore, it would have been obvious to remove the uppermost band which is parallel with the floor about its entire circumference and obvious to remove portions of the outer zig-zag band at the corner portions or any part of the outer zig-zag band which extends above a corresponding adjacent portion of the inner zig-zag band since the inner zig-zag band provides sufficient support to the sides of items stacked in the tray of Carroll and the elimination of the uppermost band and the portions of the outer zig-zag band would save material cost of resin used in

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manufacturing and to save weight making transport of the trays more economical. Note that the lower portions of the outer zig-zag band which act as columns to attach the inner zig-zag band to the floor and lower portions which form ribs on the exterior of the band corner portions are not removed.

V Claim 8 is rejected under 35 U.S.C. 103(a) as being unpatentable over Apps in view of David.

Apps discloses the invention except for an angle of 50 degrees as the downward contour angle of the band to form band corner portions and the band central portion. David teaches a crate wherein V-shaped structures are used to secure a band to a floor structure, the V-shaped structures have two arms (34, 35). The V-shaped structure show that a side band and a floor structure can be connected securely with an integrally molded V-shaped structure as shown in Fig. 6 where the two arms adjacent the corner, one associated with the end wall and the other associated with the side wall, and other structures are located centrally to the side, connect the band and floor with a downwardly contoured structure where the angle is about 60 degrees which is approximately 50 degrees. It would have been obvious to modify the corner portions and band central portion to have a 50 degree downward contour in order to have a corner portion or central portion which covers a greater peripheral extent of the side wall to keep the contents from slipping out of the container between the band and the floor.

VI Claims 11, 16 and 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Carroll in view of Apps.

Carroll discloses the invention except for the inwardly projecting inner column surface and the corresponding recessed outer surface. Apps teaches columns 18 with inwardly

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projecting inner surfaces and corresponding recessed outer surfaces. It would have been obvious to replace the columns of Carroll with Apps' columns in order to provide columns with nesting structure which restrict movement when in the nested configuration and which assist in aligning the trays when the trays are being nested.


35 U.S.C. 101 reads as follows:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

 Claims 1-28 are rejected under the judicially created doctrine of double patenting over claims 1-13 of U. S. Patent No. 6,186,328 and drawing figures 1-10 of U.S. Patent No. D404,204 since the claims, if allowed, would improperly extend the "right to exclude" already granted in the patents.

The subject matter claimed in the instant application is fully disclosed in the patent and is covered by the patent since the patent and the application are claiming common subject matter, as follows: A tray for supporting cans comprising a floor structure and a low depth wall

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structure, the wall structure having a plurality of columns and a band member with side and end portions.

Furthermore, there is no apparent reason why applicant was prevented from presenting claims corresponding to those of the instant application during prosecution of the application which matured into a patent. See *In re Schneller*, 397 F.2d 350, 158 USPQ 210 (CCPA 1968). See also MPEP § 804.

Applicant's arguments with respect to claims 1-28 have been considered but are moot in view of the new ground(s) of rejection.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).


A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Stephen J. Castellano whose telephone number is 703-308-1035. The examiner can normally be reached on M-Th 6:30-5.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Lee W. Young can be reached on 703-308-2572. The fax phone numbers for the organization where this application or proceeding is assigned are 703-872-9302 for regular communications and 703-872-9303 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-1148.


Stephen J. Castellano
Primary Examiner
Art Unit 3727

sjc
March 31, 2003